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IN THE

Supreme Court of the United States

GLEN WHORTON, DIRECTOR,
NEVADA DEPARTMENT OF CORRECTIONS,
Petitioner,

v.

MARVIN HOWARD BOCKTING,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

SARAH O'ROURKE SCHRUP
NORTHWESTERN UNIVERSITY
SUPREME COURT PRACTICUM
357 East Chicago Avenue
Chicago, IL 60611
(312) 503-8576

JEFFREY T. GREEN*
MARIANNE T. CAULFIELD
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Amicus Curiae

* Counsel of Record

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QUESTIONS PRESENTED

I. Whether, in direct conflict with the published opinions of the Second, Sixth, Seventh, and Tenth Circuits, the Ninth Circuit erred in holding that this Court's decision in *Crawford* v. *Washington*, 541 U.S. 36 (2004) regarding the admissibility of testimonial hearsay evidence under the Sixth Amendment, applies retroactively to cases on collateral review.

II. Whether the Ninth Circuit's ruling that *Crawford* applies retroactively to cases on collateral review violates this Court's ruling in *Teague* v. *Lane*, 489 U.S. 288 (1989).

III. Whether, in direct conflict with the published decisions of the Fourth and Seventh Circuits, the Ninth Circuit erred in holding that 28 U.S.C. § 2254(d)(1) and (2) adopted the *Teague* exceptions for private conduct which is beyond criminal proscription and watershed rules.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae the National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation of more than 10,000 attorneys and 28,000 affiliate members in all 50 States. The American Bar Association ("ABA") recognizes NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates.

Founded in 1958, NACDL promotes research in the field of criminal law, disseminates and advances knowledge relevant to that field, and encourages integrity, independence, and expertise in criminal defense practice. NACDL works tirelessly to ensure the proper administration of justice, an objective that this case directly impacts in light of its overarching importance to ensuring that prior criminal convictions are accurate and based upon reliable, tested evidence. NACDL's membership has long relied upon cross-examination as one of the vital means of ensuring accuracy. As such, NACDL is uniquely qualified to offer assistance to this Court in this matter.

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Ninth Circuit correctly held that the new rule announced in *Crawford* v. *Washington*, 541 U.S. 36 (2004), satisfies the test established by this Court in *Teague* v. *Lane*, 489 U.S. 288 (1989), that a new procedural rule applies retroactively to cases on collateral review if such rule is a watershed rule by implicating "the fundamental fairness of the trial." *Teague*,

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[1] Pursuant to Rule 37.6, *amicus curiae* states that no counsel for a party authored any part of this brief, and no person or entity, other than the *amicus curiae*, its members and its counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for both parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk.

489 U.S. at 412. This is true for two reasons. *First*, to the extent, as the Ninth Circuit held, *Crawford* established a new rule by overruling *Ohio* v. *Roberts*, 448 U.S. 56 (1980), *Crawford* adopted a testimonial approach when determining the admissibility of out-of-court statements at trial. This approach acknowledges that the admission of such testimonial statements, made by a witness who is purported to be unavailable at trial, denies the accused his only constitutional means to assess the veracity of such statements. *Second*, this new rule is a watershed rule of criminal procedure because *Crawford*'s prohibition of the use of testimonial out-of-court statements affects the fundamental fairness and accuracy of a criminal proceeding under the second prong of *Teague* such that it mandates retroactive application to cases on collateral review. The right of an accused to confront his accuser conferred by the Confrontation Clause of the Sixth Amendment is as vital to the protection of an accused's constitutional rights as his Sixth Amendment right to counsel. Deprived of an opportunity to cross-examine a witness, the accused is denied "the 'greatest legal engine ever invented for the discovery of truth.'" *California* v. *Green*, 399 U.S. 149, 158 (1970) (quoting 5 J. Wigmore, *Evidence* § 1367 (3d ed. 1940)).

ARGUMENT

I. DEPRIVATION OF DEFENSE COUNSEL'S ABILITY TO CONFRONT AN ACCUSER SERIOUSLY DIMINISHES THE ACCURACY OF SUBSEQUENT CONVICTIONS.

The language of *Crawford* itself emphasizes, underlines and reiterates just how vital the right of confrontation is to the fundamental fairness of a criminal trial. It is a "bedrock procedural guarantee [that] applies to both federal and state prosecutions." *Crawford*, 541 U.S. at 42 (citing *Pointer* v. *Texas*, 380 U.S. 400 (1965)). In addition, this Court's decision in *Crawford*, which overruled *Roberts*, 448 U.S. 56,

abandons nearly a quarter century of precedent interpreting the Sixth Amendment and adopts a new framework in its Confrontation Clause jurisprudence. *Crawford*, 541 U.S. at 75. See, *e.g.*, Alexander J. Wilson, *Defining Interrogation Under the Confrontation Clause After Crawford v. Washington*, 39 Colum. J.L. & Soc. Probs. 257, 258 (2005); Robert M. Pitler, *Symposium: Crawford and Beyond: Exploring the Future of the Confrontation Clause in Light of Its Past*, 71 Brook. L. Rev. 1, 1-2 (2005).

Crawford's framework preserves the original intention of the drafters of the Confrontation Clause by ensuring that, whenever testimonial evidence is at issue, such evidence will not be admitted at trial unless the accused has had an opportunity to cross-examine the witness. "[T]he Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Crawford*, 541 U.S. at 68. *Crawford* makes clear that "the principle evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." *Id.* at 50. *Crawford*'s imposition of an outright bar on testimonial statements if the witness is unavailable for trial or otherwise not subject to cross-examination has been interpreted as a new procedural rule by every court that has since addressed the issue. See 4 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 398.1 (2d ed. 2006) (listing post-*Crawford* cases).

Under *Teague*, a new procedural rule is applied retroactively if it establishes a watershed rule, *i.e.*, a rule "implicating the fundamental fairness and accuracy of the criminal proceeding." *Saffle* v. *Parks*, 494 U.S. 484, 495 (1990). This includes a rule "'without which the likelihood of an accurate conviction is seriously diminished.'" *Schriro* v. *Summerlin*, 542 U.S. 348, 352 (2004) (quoting *Teague*, 489 U.S. at 313). *Crawford* satisfies these criteria. The purpose of the Confrontation Clause is to promote accuracy by

ascertaining the truth and reliability of evidence as assessed "in a particular manner: by testing in the crucible of cross-examination." *Crawford*, 541 U.S. at 61. *Crawford* does not merely "reshape the contours" of the Sixth Amendment Right to Confrontation, as Petitioner asserts. Brief of Petitioner at 29. Rather, *Crawford* reaffirmed the original intent of the Framers, who properly understood that cross-examination is a fundamental procedure designed to test evidence and thereby enhance its accuracy. *Crawford* thus reiterated what the Framers knew – that a judicial determination of testimonial reliability does not guarantee accuracy. In short, the very purpose of the *Crawford* rule is to enhance the accuracy of the evidence used to convict, and in that regard, one would be hard pressed to identify any factor more relevant to "'the likelihood of an accurate conviction.'" *Summerlin*, 542 U.S. at 352 (quoting *Teague*, 489 U.S. at 313). Accordingly, a failure to test the veracity of the evidence by cross-examination diminishes the likelihood of an accurate conviction.

II. *CRAWFORD*'S NEW RULE GIVES EFFECT TO THE FRAMER'S MECHANISM FOR EVIDENTIARY RELIABILITY – CROSS-EXAMINATION.

The Court has on numerous occasions recognized that confrontation/cross-examination is a necessary predicate for truth and reliability of results in criminal trials. *Pointer* v. *Texas*, 380 U.S. 400, 405 (1965); *Chambers* v. *Mississippi*, 410 U.S. 284, 295 (1973); *Kentucky* v. *Stincer*, 482 U.S. 730, 737 (1987); *Dutton* v. *Evans*, 400 U.S. 74, 89 (1970); *Lee* v. *Illinois*, 476 U.S. 530, 539-40 (1986). *Crawford* established that out-of-court statements by witnesses that are testimonial are barred under the Confrontation Clause, unless witnesses are unavailable and defendants had prior opportunity to cross-examine witnesses. This broke completely with the test in *Roberts*, which determined admissibility based on whether

such statements are deemed reliable by a court.[2] *Crawford*, in abrogating *Roberts*'s indicia-of-reliability test for determining when incriminating statements are admissible under an exception to the hearsay rule, completely altered the basis for admitting hearsay and redresses the inherent and permanent unpredictability of *Roberts's* reliability criteria. See *Crawford*, 541 U.S. at 66. In *Crawford*, the Court observed that there is no doubt that the Confrontation Clause "reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), *but about how reliability can best be determined.*" *Id.* at 61 (emphasis added). It highlighted the danger that the application of the *Roberts* reliability standard poses, *id.*, expressing concern about the fact that "[r]eliability is an amorphous, if not entirely subjective, concept." *Id.* at 63. As the Court explained, "[a]dmitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation." *Id.* at 61. Permitting a jury to hear evidence that a judge deems reliable without testing it in the adversary process is tantamount to "dispensing with jury trial because a defendant is obviously guilty." *Id.* at 62. The Framers knew that "judges, - like other government officers, could not always be trusted to safeguard the rights of the people; . . . [t]hey were loath to leave too much discretion in judicial hands." *Id.* at 67. By countermanding *Roberts* and other cases like it, the Court acknowledged the Framers' skepticism regarding judicial determinations of reliability and agreed that the Framers' test – confrontation – is the proper mechanism for determining reliability. The rejection of the *Roberts* reliability approach was complete, and it is because of that absolute rejection in *Crawford* that Petitioner's argument that

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[2] Under *Roberts*, there were two ways in which the indicia-of-reliability requirement could be met: (1) where the hearsay statement "falls within a firmly rooted hearsay exception," or (2) where it is supported by a "showing of particularized guarantees of trustworthiness." *Roberts*, 448 U.S. at 66.

the *Crawford* rule merely "reshaped the contours" of the right to confrontation must fail. Brief of Petitioner at 29.

A. Cross-Examination Is Critical To The Truth-Seeking Process.

We respectfully disagree with Petitioner's position that cross-examination "may prove to be no more than 'superfluous'" or offer "an 'incidental benefit' at best." Brief of Petitioner at 13 (quoting concurring opinion in *Crawford*, 541 U.S. at 75). This flies in the face of the Framers' view that confrontation is the far better, and fairer, mechanism for determining reliability, and it is wrong. Legal scholars, practitioners and judges have long recognized the importance of cross-examination to discovering the truth.[3] "The power and opportunity to cross-examine . . . is one of the principal tests which the law has devised for the ascertainment of truth, and is certainly a most efficacious test." 1 Thomas Starkie, *Law of Evidence* 129 (1824). Of course, if all witnesses had the integrity and smarts to come forward and meticulously follow the letter as well as the spirit of the oath, *to tell the truth, the whole truth and nothing but the truth*, and, if attorneys on both sides had the necessary experience, combined with the integrity and intelligence and swore to develop the whole truth and nothing but the truth, there would of course be no need for cross-examination. But, as yet, "no substitute has ever been found for cross-examination as a means of separating truth from falsehood, and of reducing

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[3] In the past eight years, there have been no less than thirty-five articles in The Champion, published by the NACDL, addressing the importance of cross-examination for both the defense and the prosecution. Cross-examination is so important to testing the reliability of witnesses that NACDL dedicates countless hours to providing criminal defense attorneys with preparation in cross-examinations. This year alone NACDL will offer more than twelve different seminars and workshops on cross-examination techniques to criminal defense attorneys. Other associations such as the American Bar Association also provide many workshops and seminars on cross-examination to attorneys.

exaggerated statements to their true dimensions." Francis L. Wellman, *The Art of Cross-Examination* 7 (1923).

Cross-examination helps the truth-seeking process in at least three vital ways. First, cross-examination allows the opposing counsel to introduce additional necessary facts which the witness may have omitted during direct examination. Typically, those suppressed or underdeveloped facts, as described by Professor Wigmore[4] in his seminal treatise on evidence, are (1) "the remaining and qualifying circumstances of the subject of testimony" and (2) "the facts which diminish the personal trustworthiness or credit of the witness." 5 J. Wigmore, *Evidence* § 1368, at 37 (3d ed. 1940) (emphasis omitted). If nothing more were done to reveal all the facts known to the witness, the witness's testimony "might present half-truths only." *Id.* "Someone must probe for the possible (and usual) remainder. The best person to do this is the one most vitally interested, namely, the opponent." *Id.* While some facts can be introduced by other witnesses, often these important additional facts can "be obtained only from the witness himself – particularly those which concern his personal conduct and his sources of knowledge for the case in hand." *Id.*

The second vital way cross-examination helps the truth seeking process is by allowing these important facts to be introduced immediately after direct examination, in order to refute what the jury may have just heard. In this way, "the modification or the discredit produced by the facts extracted is more readily perceived by the [fact-finder]." *Id.* at 38. Finally, cross-examination allows the essential refutation to come directly from the witness him- or herself; a damaging effect that can hardly be matched by hearing contradictory testimony provided by other witnesses. *Id.*

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[4] Professor Wigmore devotes over 200 pages in his treatise to cross-examination and confrontation, underscoring the importance of cross-examination to the truth-seeking process.

B. *Crawford* Curbs Prosecutorial Abuse Of Testimonial Statements.

Crawford also preserves the Framers' understanding that confrontation curbs the abuse of state power. *Crawford*, 541 U.S. at 56 n.7. The "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse – a fact borne out time and again throughout a history with which the Framers were keenly familiar." *Id.* The prosecution's power provides an enormous advantage to the prosecution in a criminal trial, which the Bill of Rights is designed to limit. See Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 Minn. L. Rev. 557, 561 & n.18 (1992) (citing *Wardius* v. *Oregon*, 412 U.S. 470, 480 (1973) (Douglas, J., concurring)). The Framers designed the Confrontation Clause to curb such abuse in at least three ways: by preventing: (1) secrecy about the identity of the witness providing testimony or the circumstances surrounding the testimony; (2) presentation of a false account of the witness' story or the conditions under which it was produced; and (3) pressuring the witness with intimidation or taking advantage of his vulnerabilities. Roger C. Park, *Purpose as a Guide to the Interpretation of the Confrontation Clause*, 71 Brook. L. Rev. 297, 298 (2005).

Nowhere are the twin concerns of reliability and state conduct more visible than in cases involving child abuse. When the prosecution obtains evidence through private interviews, the potential for abuse is increased because the prosecution has the power and incentive to mold the child's responses to conform to the theory of the case. In this case, in a recorded interview, the child made statements to a police detective and also demonstrated the incidents with anatomically correct dolls. At the preliminary hearing, the prosecutor questioned the child. During the course of this questioning, the child could not remember what she had told the police detective. In spite of this uncertainty (and

suggestion that the original questions may have been leading, given the child's inability to recall events of this magnitude), the judge declared that the child was an unavailable witness, determined the child's statements were reliable and admitted them into evidence. Without having seen the child or heard her answers to these absolutely core questions, the jury found Mr. Bockting guilty and he now serves a life sentence. His counsel never had the opportunity to examine the child to test for suggestibility, *i.e.*, whether the child may have been led into false testimony. Instead, he was convicted on the basis of a judge's determination that the child's earlier statements were more reliable than the later ones, a critical determination that only the jury could perform.

The inability to conduct any sort of examination of principal witnesses in child abuse prosecutions has had a telling effect on the reliability and accuracy of convictions in such cases. Accusations of sexual abuse of children understandably raise the most powerful emotions, and often also incite terrible acts of supposed vengeance. David A. Fahrenthold, *Online Registry or Target List?*, Wash. Post, Apr. 20, 2006, at A03; Brian MacQuarrie, *Man Defends Attacks on Sex Offenders*, Boston Globe, Dec. 5, 2004, at A1; Elizabeth Mehren, *Sex Offender Site Back Up; Maine's registry went offline after two men listed were slain and the suspect killed himself*, L.A. Times, Apr. 19, 2006, at A7. As a result, there are numerous, well-documented miscarriages of justice where, as here, the defense never had the opportunity to examine and to test the principal testimonial evidence underlying a conviction. See Innocence Lost: the Plea (May 27, 1997) (PBS television broadcast), *available at* http://www.pbs.org/wgbh/pages/frontline/shows/innocence/etc/other.html (last visited Sept. 20, 2006). Instead, as these cases amply demonstrate, the defense must contend with a biased or interested prosecution witness whose function is to offer the hearsay statements of the victim and to defend the truth and reliability of those statements, often on the basis of

their own credibility rather than that of the child. *Id.;* see also *State* v. *Michaels*, 625 A.2d 489, 510 (N.J. Super. Ct. App. Div. 1993), *aff'd*, 642 A.2d 1372 (N.J. 1994); *Snowden* v. *Singletary*, 135 F.3d 732, 737-38 (11th Cir. 1998).

The subsidiary issues at work in such cases are also present here. For example, experts have long questioned and discredited the tactic of asking leading and repetitious questions in connection with the use of anatomical dolls. Stephen J. Cecil & Maggie Bruck, Am. Psychological Ass'n, *Jeopardy in the Courtroom – A Scientific Analysis of Children's Testimony* (1995), *available at* http://www.pbs.org/wgbh/pages/frontline/shows/innocence/readings/dolls.html. To that end, this Court has held that leading questioning may provide grounds for overturning a conviction. *Idaho* v. *Wright*, 497 U.S. 805, 826-27 (1990) ("'[i]f there is evidence of prior interrogation, prompting, or manipulation by adults, spontaneity may be an inaccurate indicator of trustworthiness'" (alteration in original) (quoting *State* v. *Robinson*, 735 P.2d 801, 811 (Ariz. 1987)). Sensational, but ultimately inaccurate medical evidence has also been a common feature of such prosecutions. *Swan* v. *Peterson*, 6 F.3d 1373, 1384 (9th Cir. 1993). See also Katha Pollitt, *Justice for Bernard Baran*, The Nation, Feb. 21, 2000, *available at* http://www.thenation.com/doc/20000221/pollitt; *Commonwealth* v. *Baran*, No. 18042-51, 2006 WL 2560317 (Mass. Super. Ct. June 16, 2006). And finally, such cases are marked by judges reaching highly subjective declarations of the incompetence and unavailability of the alleged victim because the victim cannot remember the alleged events, see, *e.g.*, *State* v. *Blue*, 717 N.W.2d 558 (N.D. 2006), provided inconsistent descriptions of the alleged events, see, *e.g.*, *George* v. *State*, 813 S.W.2d 792 (Ark. 1991), or proves unable to distinguish between the truth and a lie, see, *e.g.*, *State* v. *Dwyer*, 440 N.W.2d 344, 345-46 (Wis. 1989), and then admitting an alleged victims' hearsay declarations

without providing defendants an opportunity to cross-examine.

While there obviously needs to be sensitivity in such cases, such sensitivity does not warrant wholesale suspension of Confrontation Clause rights. The long history of miscarriages of justice in this area demonstrate just how fundamental the Confrontation Clause right is in producing a reliable and accurate result at trial.

III. CONFRONTATION, LIKE COUNSEL AND COMPULSORY PROCESS, IS A BEDROCK RULE OF CRIMINAL PROCEDURE.

Before determining whether *Crawford* can be applied retroactively under *Teague*, the initial threshold question is to determine whether it is a new rule. While the Ninth Circuit divided on this question, the majority found that *Crawford* is a landmark decision that establishes new criteria for determining the admission of witness testimony – the testimonial approach.[5] In this respect, the majority found, *Crawford*'s break with precedent qualifies it as a new rule under the new rule doctrine of *Teague* and its progeny. See Tung Yin, *A Better Mousetrap: Procedural Default as a Retroactivity Alternative to Teague v. Lane and the Antiterrorism and Effective Death Penalty Act of 1996*, 25 Am. J. Crim. L. 203 (1998); Lyn S. Entzeroth, *Reflections on Fifteen years of the Teague v. Lane Retroactivity Paradigm: A Study of the Persistence, the Pervasiveness, and the Perversity of the Court's Doctrine*, 35 N.M L. Rev. 161 (2005).

The next step under *Teague* is to determine whether this rule can be applied retroactively to cases on collateral review.

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[5] *Amicus* takes no position as to whether *Crawford* is an old or new rule. *Bockting* v. *Bayer*, 399 F.3d 1010, 1024 (9th Cir.) (Noonan, J. concurring), *opinion amended on denial of reh'g*, 408 F.3d 1127 (9th Cir. 2005), *cert. granted sub nom. Whorton* v. *Bockting*, 126 S.Ct. 2017 (2006).

Since 1965, the Court has been curbing the impact of retroactive applications of law. See *Teague*, 489 U.S. at 302 (discussing retroactivity jurisprudence from *Linkletter* v. *Walker*, 381 U.S. 618 (1965), *disapproved*, *Griffith* v. *Kentucky*, 479 U.S. 314 (1987) to the present). While there is a general presumption against retroactive application of procedural rules, it is not irrebutable; granting retroactive relief to state prisoners based on newly articulated rules is neither an arbitrary nor modern creation that may be swept aside or haphazardly curtailed. See *Teague*, 489 U.S. at 316. New procedural rules generally do not apply retroactively because they do not produce a class of persons convicted of conduct the law does not make criminal, "but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Summerlin*, 542 U.S. at 352. Nonetheless, new procedural rules that are fundamental and "'without which the likelihood of an accurate conviction is seriously diminished" are applied retroactively on a collateral review. *Id.* (emphasis omitted) (quoting *Teague*, 489 U.S. at 313). Under the second exception of *Teague*, a procedural rule can be applied retroactively only if it is a watershed rule, a rule which goes to the "fundamental fairness" and accuracy of the criminal proceeding, or a rule that is one "without which the likelihood of an accurate conviction is seriously diminished." *Teague*, 489 U.S. at 312-13.

Crawford falls under the second exception because it establishes a new watershed procedural rule in preserving the Sixth Amendment rights of the accused. In *Crawford*, the Court undertook a thorough examination of the history of the Confrontation Clause to understand its original meaning and concluded that the Founding Fathers meant to prohibit testimonial statements such as "'*ex parte* in-court testimony or its functional equivalent'" that the "'defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially.'"

Crawford, 541 U.S. at 51 (quoting *White* v. *Illinois*, 502 U.S. 346, 265 (1992)). Specifically, the Court emphasized "that the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Id.* at 53-54. Further, this Court reasoned that "[w]here testimonial evidence is at issue . . . the Sixth Amendment demands . . . unavailability and a prior opportunity for cross-examination." *Id.* at 68.

The Court has recognized the importance of cross-examination to the reliability of a result in a criminal trial numerous times. Cross-examination enables the accused to explore inconsistencies between a witness' testimony and other evidence, probe any biases that may have led the witness to distort the truth, and open lines of inquiry that the State, for whatever reason, may have neglected. *Taylor* v. *Illinois*, 484 U.S. 400, 411-12 (1988) (stating "cross-examination[] minimizes the risk that a judgment will be predicated on incomplete, misleading, or even deliberately fabricated testimony"). There has been a long history of this procedural protection. As the Court notes in *Crawford* (citing *King* v. *Paine*, 5 Mod. 163, 87 Eng. Rep. 584 (1696)), the Court of the King's Bench held that "the admissibility of an unavailable witnessess's pretrial examination depended on whether the defendant had had an opportunity to cross-examine him." *Crawford*, 541 U.S. at 45. Further, in *Pointer*, 380 U.S. at 405, this Court noted: "There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." "The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the 'accuracy of the truth-

determining process.'" *Chambers*, 410 U.S. at 295. As one noted scholar states,

> The deep principles underlying the Sixth Amendment's three clusters and many clauses . . . are the protection of innocence and the pursuit of truth. . . .
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> . . . .
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> . . . Counsel, confrontation, and compulsory process are designed as great engines by which an innocent man can make the truth of his innocence visible to the jury and the public.

Akhil Reed Amar, *Sixth Amendment First Principles*, 84 Geo. L.J. 641, 642-43 (1996).

IV. AS WITH THE COURT'S HOLDING IN *GIDEON*, RETROACTIVE APPLICATION IS APPROPRIATE HERE.

New procedural rules should be applied retroactively when they are watershed or bedrock procedural rules, *i.e.*, rules without which the likelihood of an accurate conviction would be seriously diminished. See *Summerlin*, 542 U.S. at 352 and *Teague*, 489 U.S. at 313. *Crawford* announces such a rule. Cross-examination is essential to the fundamental right of confrontation and has been recognized by this Court as "the principal means by which the believability of a witness and the truth of his testimony are tested." See *Davis* v. *Alaska*, 415 U.S. 308, 316 (1974). The *Crawford* rule goes to the heart of the fundamental fairness and accuracy of a criminal proceeding. Not only is it fundamentally *un*fair to permit testimony to be admitted when the witness is unavailable and a defendant is not given the opportunity to cross-examine the witness, it is fundamentally unfair to conduct a trial in which only one side has unfettered access to the principal witnesses and key testimony. See *Saffle*, 494 U.S. at 495. Here, the child's statements that were admitted without cross-examination were the critical and primary statements used by

the prosecution to present its case against defendant and the primary statements that led to Mr. Bockting's conviction. The admission of these wholly untested statements diminished the likelihood of an accurate conviction, even putting to one side the child's inconsistency as to whether the abuse occurred. The principal witness in this matter was in the hands of government agents and prosecutors at all times and, plainly, was subjected to leading, misleading and repetitive questioning. The Framers themselves expressed skepticism about the abilities of a jury to discern the truth under such conditions. For this reason, they enshrined cross-examination as the means of bringing out the truth in a trial, exposing falsehoods, and ensuring that evidence admitted against an accused is reliable. See *Mattox* v. *United States*, 156 U.S. 237, 242-43 (1895). In this respect, *Crawford* establishes a watershed rule of criminal procedure that is at least equal to the right to counsel as set forth in *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), for the two go hand-in-hand. Little is to be gained from the provision of counsel if counsel is deprived of its most essential tool.

Further, the *Teague* test, while restrictive, cannot rationally apply to but one instance among bedrock principles of criminal procedure. *Gideon* cannot be the only watershed rule. *Gideon* addressed only one right conferred by the Sixth Amendment, the right to counsel. It makes little sense to establish a test such as *Teague* unless the Court expected that other rules, prospectively made, would satisfy the second exception of *Teague* and qualify for retroactive effect. Nevertheless, courts continue to view the right to counsel as the only right conferred by the Sixth Amendment as a watershed rule that can pass through *Teague*'s funnel. See, *e.g.*, *O'Dell* v. *Netherland*, 521 U.S. 151, 167 (1997); *Saffle*, 494 U.S. at 495; *Leavitt* v. *Arave*, 383 F.3d 809, 826 (9th Cir. 2004) (per curiam); *United States* v. *Mandanici*, 205 F.3d 519, 528-29 (2d Cir. 2000).

From the perspective of a criminal defendant, cross-examination means not only the ability to get at the truth, but the ability to present one's own version of the *facts*. Questions and arguments from counsel are not testimony and jurors may not consider them as evidence. See Ninth Circuit Model Criminal Jury Instructions § 3.7 (2003). Accordingly, a prosecution's admissions on cross-examination are a principal means – and often, the only means – to establish a defense that the jury may consider. Many, many prosecutions, as here, involve accusations made by one or more witnesses where the only possible defense witness is the defendant himself. For independent and sensible reasons, a defendant may elect not to testify and where that is the case, cross-examination is the sole procedural vehicle for the defense to present its case. Deprivation of that vehicle, whether it is the sole vehicle or not, is tantamount to disallowing a defense altogether. As such, it cannot help but seriously diminish the likelihood of an accurate conviction. Thus, the rule in *Crawford* should be deemed a watershed rule by this Court for purposes of *Teague* and applied retroactively for cases on collateral review just as was done with the rule in *Gideon*.

The *Teague* exceptions are sufficiently narrow to discourage overuse. It is fundamentally fair to permit habeas petitioners to benefit from new rules that enforce bedrock constitutional protections. Retroactive application is a power this Court retains for exceptional cases to ensure that there is a floor of fundamental fairness in our criminal justice system. See, *e.g.*, *Gideon* v. *Wainwright*, 372 U.S. 335 (all criminal defendants facing the possibility of imprisonment have the right to counsel); *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886) (criminal statutes may not be arbitrarily applied to persecute one group).

Furthermore, the retroactive application of the *Crawford* rule serves the fundamental purpose of the Great Writ of Habeas Corpus to protect the innocent criminal defendant

from erroneous conviction and punishment. See *Bousley* v. *United States*, 523 U.S. 614, 620 (1998). Indeed, federal habeas corpus petitions are meant to ensure that "no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted." *Desist* v. *United States*, 394 U.S. 244, 262 (1969) (Harlan, J., dissenting), quoted in *Teague*, 489 U.S. at 312; see *O'Neal* v. *McAninch*, 513 U.S. 432, 442 (1995) ("the basic purposes underlying the writ of habeas corpus" include correcting "an error of constitutional dimension – the sort that risks an unreliable trial outcome and the consequent conviction of an innocent person"). *Crawford* itself was based on the principle that cross-examination is essential to obtaining an accurate conviction. The retroactive application of *Crawford*, therefore, is not only consistent with the fundamental purpose of the Great Writ, but it also reinforces the basic protection that the Writ was designed to provide.

CONCLUSION

For the foregoing reasons, as well as those stated in Respondent's Brief, the judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

SARAH O'ROURKE SCHRUP
NORTHWESTERN UNIVERSITY
SUPREME COURT PRACTICUM
357 East Chicago Avenue
Chicago, IL 60611
(312) 503-8576

JEFFREY T. GREEN*
MARIANNE T. CAULFIELD
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Amicus Curiae

* Counsel of Record

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